PEREMBUN CONSORTIUM & ANOR A

v.

AXA AFFIN GENERAL INSURANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR B
HANIPAH FARIKULLAH JC
[SUIT NO: D-22-1652-2009]
20 AUGUST 2010

CONTRACT: *Construction of terms of contract - Contra proferentum rule - Defendant provided Contractor's All Risk Policy for upgrading works on major highway - Works to be done without blocking traffic flow - Massive damage to construction works by flood - Insurer repudiated liability on ground works 'taken over' or 'put into service' - Whether works taken over by government at time of damage - Whether 'put into service' should be given business common sense meaning instead of natural and ordinary meaning* C D

The second plaintiff ('Perembun') and another company, Road Builder (M) Sdn Bhd ('Road Builder'), formed a consortium which successfully bid for a project from the Government of Malaysia to upgrade the highway from Gemas to Ayer Hitam, Johore ('the project'). The project was awarded on condition it had to be carried out in stages to avoid traffic congestion and inconvenience to road users. The works included road widening, upgrading, alignment and repair, modification/extension of existing bridges and culverts, construction of slopes and retaining walls and drainage. The consortium awarded part of the works to Perembun and the rest to Road Builder. In compliance with the requirements of the tender, Perembun obtained from the defendant a Contractor's All Risks Insurance Policy ('CAR Policy') in favour of itself and Road Builder to cover the construction period from 20 June 2002 till 19 June 2005 and maintenance period from 20 June 2005 till 19 June 2007. The defendant later extended insurance coverage on the construction period from 20 June 2002 till 18 June 2007 and on the maintenance period from 1 January 2007 till 15 April 2009. E F G

On 19 December 2006 an unusually heavy flood following a thunderstorm caused massive loss and damage to a section of the construction works. Perembun notified the defendant that the loss and damage amounted to RM16,704,400. After appointing loss adjusters to study the claim, the defendant repudiated liability on the ground coverage ceased once the project works had been 'taken over' by the principal or 'put into service'. H I

Perembun said that prior to the issuance of the insurance policy and during the progress of the works and each time any extensions to the policy was made, the defendant knew that the highway could not be closed as it was the main trunk road between Gemas and Ayer Hitam. No section of the project was kept out of use for an extended period of time, because work was done in sections, and once the work on a section was completed, it was re-opened to traffic. The court found that the government issued a Certificate of Practical Completion (CPC) for the whole works on 19 September 2007.

Held (allowing the claim with costs and ordering damages to be assessed by the Registrar):

(1) At the time when the flood occurred on 19 December 2006, the works had not been "taken over" by the government. (para 27)

(2) The damage by the flood was covered by the policy though, by then, it was already put into use since there was a provision covering maintenance period which pre-supposed the roads being put into use after completion. (para 52)

(3) If the plain and ordinary interpretation was given to the exclusionary clause in the policy, it would render the extended maintenance period illusory because the maintenance period only came into play after construction works were completed and after it was put into use. (para 53)

(4) The intention that liability was to continue notwithstanding sections of the road were "put into service" could be seen by the several extensions to the policy. If the defendant took the stand that the policy was repudiated because the works were put into use, why did it keep extending coverage for the construction and maintenance periods even after the works had been "put into service". (para 54)

(5) As the highway was always in use since the commencement of the works, it would be absurd and made no business sense if the natural and ordinary meaning of the words "put into service" was applied. That would mean liability would immediately cease as soon as works began and that was plainly not what the parties intended. (para 55)

Case(s) referred to:

Investors Compensation Scheme v. West Bromwich Building Society [1998] 1 All ER 98 ***(refd)***

Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 PC ***(refd)***

Malaysia British Assurance Bhd v. Syarikat Pembenaan Karun Sdn Bhd [2009] 4 CLJ 1 CA ***(foll)***

Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud [1978] 1 LNS 117 FC ***(refd)***
Paul Tudor Jones II & Marsh & McLennan Inc v. Crowley Colosso Ltd [1996] 2 Lloyd's Rep 619 ***(dist)***

For the plaintiffs - Philip Chai (Devan Narayanan Raman with him); M/s Devan & Assocs
For the defendant - YM Tunku Farik Ismail (YW Lee with him); M/s Azim, Tunku Farik & Wong

Reported by Ashok Kumar

JUDGMENT

Hanipah Farikullah JC:

[1] The second plaintiff, Perembun (M) Sdn Bhd ("the second plaintiff") claim against the defendant, Axa Affin General Insurance Berhad for a sum of RM16,704,400 from the defendant under the Contractor's All Risks Insurance Policy ("Car Policy") for the loss or cost of repairing the damaged works suffered by the plaintiff as a result of a flood that occurred on 19 December 2006.

Background Facts

[2] By a consortium agreement, the second plaintiff and Road Builder (M) Sdn Bhd agreed to form a consortium known as Perembun Consortium for the purposes of bidding and tendering for a project by the Government of Malaysia described as "Menaiktaraf laluan 1 dari Gemas ke Ayer Hitam, Johor Secara Deferred Payment Scheme" ("the project").

[3] By a letter of award dated 22 May 2002, the project was awarded by the Government of Malaysia to Perembun Consortium subject to the terms and conditions stated in the letter. Clause 9 of the letter of award states *inter alia*:

> Untuk makluman tuan, perlaksanaan projek ini perlu dilaksanakan secara berperingkat bagi mengelakkan kesesakan lalulintas dan kerumitan kepada pengguna jalan raya ... .

[4] By a further letter dated 24 May 2002, Jabatan Kerja Raya Malaysia (JKR) informed Perembun Consortium that their tender has been accepted subject to the terms and conditions stated therein. Clause 6 of the letter states:

A Sebelum tuan dibenarkan memulakan kerja-kerja diatas, tuan adalah diarahkan untuk mengambil dan mengemukakan ke pejabat ini dokumen-dokumen seperti berikut:

(c) Polisi Insurans Untuk Kerja (Insurance Policy for the Works)

B Polisi ini hendaklah dikeluarkan oleh Syarikat Insurans yang diakui dan diambil diatas nama Kerajaan Malaysia dan Kontraktor berharga RM214,950,000.00 bermula dari tarikh 20.6.2002 hingga 19.6.2005 (tempoh kontrak) untuk menanggung liability "against loss and damages by fire, lightning, explosion, storm, tempest, flood, ground subsidence, bursting or overflowing of C water tanks, apparatus or pipes ... all works executed and all unfixed materials and goods, delivered to or placed adjacent to the Works and intended therefore ...

[5] By a letter of award dated 27 September 2002, Perembun Consortium awarded part of the works in particular works from D CH. 0.00 to CH. 65,000 to the plaintiff and works from CH. 65,000 to CH. 120,000 to Road Builder.

[6] Pursuant to the terms of the letter of award and the JKR letter, the plaintiff applied to the defendant for insurance coverage as required E by the authorities. On 23 July 2002, the defendant issued a Car Policy No. CCX/01001447/64/06 (exh. (P2) & (exh. P2A) (the schedule attached to the policy) in favour of the plaintiff and road builder to cover the construction period from 20 June 2002 to 19 June 2005 and maintenance period from 20 June 2005 to 19 June 2007 and subject to the terms and conditions stated therein.

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[7] By endorsements subsequently issued by the defendant evidenced in exhs. P3, P3A, P3B and P3C, the period of insurance was eventually extended to cover construction period from 20 June 2002 to 18 June 2007 and maintenance period from 1 January 2007 to 15 April 2009.

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[8] The insurance policy also contained an "extended maintenance cover" clause exh. (P2A) which state as follows:

It is agreed and understood that otherwise subject to the terms, exclusions, provisions and conditions contained in the policy or H endorsed thereon and subject to the insured having paid the agreed extra premium, this insurance shall be extended for the maintenance period specified hereunder to cover loss of or damage to the contract works:

- caused by the insured contractor in the course of the operations I carried out for the purpose of complying with the obligations under the maintenance provisions of the contract,

- occurring during the maintenance period provided such loss or damage was caused on the site during the construction period before the certificate of completion for the lost or damaged section was issued.

[9] By a letter dated 22 December 2006 the plaintiff's submitted to the defendant notification of loss or damage for the Car Policy. Subsequently, the plaintiff notify the loss adjusters for the defendant, GAB Robin (M) Sdn Bhd that the total estimated repair costs CH 0.00 - CH 05,000 is RM16,704,400. The investigation of the plaintiff's claim was passed over by the defendant from GAB Robins (M) Sdn Bhd to Crawford & Company. By a letter dated 29 June 2007, the defendant repudiated the plaintiff's claim.

[10] Hence, the plaintiff is now claiming for a sum of RM16,704,400. from the defendant under the Car Policy for the loss or cost of repairing the damaged works suffered by the plaintiff as a result of a flood that occurred on 19 December 2006.

The Defendant's Defence

[11] The defendant denied the plaintiff's claim. The defendant had repudiated liability against a claim by the plaintiff made under the policy on the following grounds:

(i) Period of Cover

The defendant's liability as insurers ceases and coverage ends in respect of the said project works that have been "taken over" by the principal or "put into service".

(ii) Endorsement A116 - Contract works "taken over" or "put into service"

The Policy was extended to cover loss of or damage to parts of the said project works "taken over" or "put into service" if such loss or damage emanates from the construction of the said project works.

(iii) Endorsement A115 - Cover for Designer's Risk

The Policy, through this Endorsement excludes the cost of replacement, repair or rectification of loss of or damage to items due to defective material and/or workmanship and/or faulty design except for loss of or damage to correctly executed items resulting from an accident due to such defective material and/or workmanship and/or faulty design.

A **Preliminary**

[12] At the trial, parties informed the court that it has been agreed that the issue for determination by the court is liability with the issue of quantum of damages to be assessed by the registrar.

B **The Second Plaintiff's Case**

[13] Haji Shorbani bin Abdul Ghani (PW1), the managing director of the second plaintiff testified that at all material times prior to the issuance of the policy and during the progress of the works and each time any C extensions were granted to the policy, the defendant knew that the highway cannot be closed as it is the main trunk road from Gemas to Ayer Hitam. PW1 explained that no section of the project was kept out of use for an extended period of time, because works was done in sections, and once the works is completed, it is reopened to traffic. In cross-examination this is what PW1 said:

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> Kerja ini adalah widening of existing road. I cannot close the road. The Government cannot close the road, so the road had been used from the beginning till now, we have got to do safety measurements so that there will not be accidents. But the road has been opened to public. It is a widening of the existing road. When we applied for the policy, they E know that the works is a widening of the road. It is not a new road. The road has been used by everybody, this is the main road from Gemas to Air Itam, it is 120KM of road, if the road is being closed.
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> On and off the insurance company comes and visit our site. And they also have a look at the progress of works. There is no official writing F to them because they come and everybody is happy with the works, progress.

[14] In cross-examination, PW1 confirmed that from the day he took possession of the site until the Certificate of Practical Completion ("the G CPC") was issued by the government on 10 September 2007, at all times, the road was used by motor vehicles except for the part that they were constructing at that time.

[15] PW1 also confirmed in cross-examination that even before the insurance policy was issued from the very beginning of the construction H works, the vehicles are using the road in the particular part of the project. According to PW1, the defendant had been given all the documents including the letter of award and the JKR letter and they knew that it was a term and condition that the highway was never to be closed at the time of issuance of the policy and at the times each I extension of the policy was granted to the plaintiff.

[16] PW1 told the court that on 19 December 2006, a heavy thunderstorm causing flood beyond average standard and degree occurred at the construction site causing massive loss and damage to the construction works. The flood was reported to be one of the worst to hit the State of Johor (exh. P4 pp. 221 and 222 bundle B). According to PW1, this fact is also stated in the loss adjuster's report dated 7 March 2007 (exh. P19) where at p. 3 of the report the loss adjuster states:

> As Insurers are fully aware the southern region of Malaysia, in particular the state of Johor suffered extreme heavy rainfall and flooding on or about 19 December 2006. As the event is well known to Insurers we do not belabour the matter but note that it was an extreme event causing widespread damages throughout the region.
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> Considerable areas of section A (which is the portion of works carried out by the Plaintiff) and to a lesser extent areas of Section B were inundated by the flood waters and the Insured alerted Insurers of the problem and damage to the works, arising from the flood water itself, from cascading heavy rainfall on the road surface outside the flood areas and from the saturation of ground such as causing Malaysia British Assurance case and slope failures.

[17] Evidence was led by PW1 that by a "Perakuan Pendudukan Separa" dated 17 January 2007 - (exh. P9 pp. 225-226 bundle B), the government awarded partial certificate of completion of the works specifically from CH 33,000.00 to CH 120,000.00. The relevant part of the said certificate states that:

> ... it is hereby certified that the relevant part has been satisfactorily completed on 21.12.2006 and taken into possession on 22.12.2006 and that the defects liability period of the relevant part shall commence on 22.12.2006 and end on 21.12.2008.

[18] With regards to the completion of the construction works, PW1 informed the court that by a CPC dated 18 September 2007 (exh. P10), the government certified that:

> the whole of the works were satisfactorily completed on 17.8.2007 and taken into possession on 18.8.2007 and that the defects liability period of the relevant part shall commence on 18.8.2007 and end on 17.8.2009.

The Defendant's Case

[19] The defendant's first witness, Teh Yau Kun (DW1), an assistant vice-president of the defendant, confirmed in cross-examination that the policy covers the construction period from 20 June 2002 until 31 December 2006 and then it covers the maintenance period from January 2007 to 15 April 2009.

[20] Mr Neil John Davis (DW2), Technical Adviser to Crawford & Company Adjusters (Malaysia) Sdn Bhd was called to give evidence in respect of whether the road has been "put into service" by the plaintiff when the flood occurred. DW2 was the loss adjusters who personally investigated the plaintiff's claim.

[21] DW2 informed the court that he had advised the defendant that all of the works where damage had taken place had been completed and "put into service" prior to the occurrence of the loss and based on this it was concluded that the loss and damage was excluded under the policy.

[22] With regards to PW1's evidence that no section of the project was kept out of use for any period of time because works was done in section, DW2 explained as follows:

> From a practical point of view, that cannot be correct. Because when you are doing works on the road, if the road has already been in use and ready as an existing road, as you are physically carrying out the works, you have to close that section of the road where the works is being carried out. But if that was not the case, you can have a car or a lorry or whatever driving through when you are actually undertaking works, which is clearly not a physical situation that can happen so it must be in case that as a section of works is carried out, that particular section is closed to traffic, and then when that particular section of works is finished, it is reopened to traffic. Also from a traffic management point of view and avoiding accidents, the same applies and the sections of the road.

[23] In cross-examination, DW2 agreed that the loss and damage occurred during the extended dates of the period of policy cover. He also agreed that the entire claim 0.000 to Chainage 33,000 was the section which has not yet been handed over to the government and no CPC not even a partial one was issued as at the date of the flood. He also agreed that the CPC was only issued for the entire works. (Chainage 65) on August 2007.

Issues For Determination

[24] The main issue that the court has to determine is whether the construction works has been "taken over" or "put in to service". If the court decides that, the works was "taken over" or "put into service", the next issue to be considered is whether such loss or damage emanates from the construction and is not due to defective material and or workmanship and or faulty design.

[25] In coming to a decision in this case, I have carefully considered the evidence adduced by both the parties together with the documentary evidence relied upon by them. The court has also gained considerable assistance from the written submission and authorities tendered in support of their respective cases.

Works "Taken Over" Or "Put Into Service"

[26] It is noted that the policy under the heading "period of cover" (p. 50 of bundle B) states as follows:

> The insurer's liability expires for part of the Insured contract works taken over or "put into service".

[27] As seen, from the wordings above, the operation of this clause is dependent if the works were "taken over" or "put into service". With regards to the issue of whether the works were "taken over", the court finds that at the time when the flood occurred on 19 December 2006, neither partial, sectional or the whole works were "taken over" by the government.

[28] The defendant in its letter of repudiation acknowledged that the works including Chainage CH 0.000 and CH 33,000 were not yet handed over to the government when the flood occurred. In cross-examination, DW2 confirmed that the damage or losses suffered by the plaintiff occurred within the extended dates of the period of the policy cover. In fact in cross-examination DW1 agreed that as at the date of flood (19 December 2006) there was no CPC or partial CPC issued in respect of the works. The court finds that the government had issued the certificate of partial completion in respect of the construction works from CH 33,000.00 to CH 120,000.00 on 17 January 2007 and CPC for the whole works was issued only on 18 September 2007. Thus, based on the above reasons the works has not been "taken over" when the flood occurred on 19 December 2006.

Works Put Into Service

[29] The next issue to be considered is whether the second plaintiff had put the "works into service" when the flood occurred. Learned counsel for the defendant submitted that the "perakuan pendudukan separa" dated 17 January 2007 (exh. P9) and the CPC dated 18 September 2007 (exh. P10) only show when parts of the project are handed over to the government and not when they were "put into service" within the meaning of the policy.

[30] The defendant submit that they have no liability under the policy as policy coverage lapses for parts of the contract works "put into service". Reference was made by counsel to the case of *Paul Tudor Jones II & Marsh & McLennan Inc v. Crowley Colosso Ltd* [1996] 2 Lloyd's Rep 619 in support of his contention.

[31] In *Paul Tudor Jone*'s case, the insured purchased a car policy based on the terms of Sun Alliance, the lead underwriters. During the period of the policy and after development of the islands by the insured had proceeded to the stage where the marina was built and the infrastructure works were in progress, the islands were struck by Hurricane Andrew on 23 August 1992. The hurricane caused substantial damage to the works in progress and the marina and the insured claimed under the policy. Apart from Sun Alliance, the other insurers only agreed to pay for damage to the works in progress but refused to pay for the claim for the damage to the marina relying on Exclusion J which is *pari material* with the definition of the "period of cover" in the Car Policy in this present case. Exclusion J provided *inter alia* as follows:

> The Insurer shall not be liable for (J) loss of or damage to any part of the permanent works (i) after such part has been taken into use by the owner ... or (ii) for which a certificate of completion has been issued ...

[32] In the case of *Paul Tudor Jone*'s, as the marina works had been the subject of a certificate of substantial completion issued to the contractor, the claim was not payable as it was excluded by exclusion J. Ultimately, the court held that both insurance brokers involved were liable for professional negligence in failing to ensure adequate coverage for the insured as the claim was clearly excluded by the policy terms.

[33] This case was relied upon by the defendant as bearing a strong resemblance to their own case upon the facts. However I am of the view that there is a vital distinction in that in the case of *Paul Tudor Jone*'s, the marina that was constructed by the insured had been completed and CPC was issued when the hurricane damaged the marina. Whereas in our present case, the CPC had not been issued in respect of the constructed works.

[34] As regards the issue of whether the defendant's liability has expired for parts of the insured contract works which were "put into service", counsel referred the court to the Court of Appeal's decision in *Malaysia British Assurance Berhad v. Syarikat Pembenaan Karun Sdn Bhd* [2009] 4 CLJ 1 (*Malaysia British Assurance*'s case) where the Court of Appeal had occasion to decide on the issue of whether the insurer is liable to compensate the insured under the policy for parts of works "put into service".

The *Ratio Decidendi* In *Malaysia British Assurance*'s Case

[35] I have perused the decision of *Malaysia British Assurance*'s case and find that the facts of the case are similar to the facts of the instant case. Thus I am obviously bound by the decision in *Malaysia British Assurance*'s case. What is the exact *ratio decidendi* of the case can only be fully understood after analysing the factual matrix and the applicable legal propositions within this context.

[36] In *Malaysia British Assurance*'s case, by a letter of award dated 1 January 1998 ("the letter of award"), the government through Sabah Public Works Department appointed the contractor to carry out and complete a project described as "A Project for Construction of the Beaufort-Mesapol Road in the State of Sabah" (Package D3-C) (Km 24 - Km 38) ("the project"). The project included the construction of a bridge over Sungai Lingkungan ("the bridge"). Pursuant to the letter of award, the respondent was required to provide, *inter alia*, insurance of works policy and contractor's all risks policy with the validity or coverage until 31 January 2002.

[37] The insurer in Malaysia British Assurance's case issued a Car Policy No. 98EKKOOO28 ("the policy"), whereby the appellant agreed to insure the insured for the project for the period from 10 July 1998 to 31 January 2002. This included a 12-month maintenance period. Under the policy, the appellant agreed to insure the insured against loss and damage to the contract works subject to the terms, exceptions and conditions of the policy. Under the policy, the insurer agreed to indemnify the respondent for loss and damage in respect of each and every occurrence of, *inter alia*, earthquake, volcanism, tsunami, storm, hurricane, cyclone, flood, inundation, any water damage, collapse, subsidence, landslide, and landslip subject to the terms and conditions thereof.

[38] In the present case, the court finds that the defendant also issued a Car Policy in respect of a project which was awarded by the government to the plaintiff to "Menaiktaraf Jalan Gemas ke Ayer Hitam". The defendant agreed to insure the plaintiff for the project for the construction period from 20 June 2002 to 18 June 2007 and a further maintenance period from 1 January 2007 to 15 April 2009 (exh. P2A, P3B and P3C p. 57-89 bundle B). Under the policy, the defendant agreed to insure the plaintiff against loss and damage to the contract works including loss and damage in respect of collapse, landslide, subsidence, upheaval, inundation (for which an excess of RM125,000 is deductible) and for any other cause (for which an excess of RM50,000) is deductible (see exh. P2A p. 74 bundle B).

[39] The policy in *Malaysia British Assurance*'s case contained the following clause:

> Period of Cover
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> The liability of the insurers shall commence notwithstanding any date to the contrary specified in the Schedule, directly upon commencement of works or after the unloading of the items entered in the schedule at the site. The insurers' liability expires for parts of the Insured contract works taken over or **"put into service"**. (emphasis added)

[40] The provision with the exact same words appears in the Car Policy in the present case (see exh. P2 p. 50 bundle B).

[41] In the present case, the contract was for the upgrading of the Gemas to Ayer Hitam highway which is a major trunk road used by traffic constantly. The works included widening upgrading and repair works to the existing highway, road alignment, modification/extension of existing bridges and culverts, construction of slope and retaining walls as well as drainage works.

[42] PW1 testified that from the date of the commencement of the works until the works were "taken over" by the government by issuance of the CPC on 18 September 2007 (exh. P10) the highway was never closed to the public and traffic. At any one time, sections of the highway would be closed or barricaded for works to be carried out but once the works had been completed, these sections were immediately opened again to traffic. This is in accordance with cl. 9 of the letter of award (p. 12 bundle B) issued by the government to ensure there was no traffic congestion and problems to highway users. At all material times prior to the issuance of the policy and each of the extensions granted, the defendant knew of this fact and had sight of all the documents relating to the condition of works from the government.

[43] In *Malaysia British Assurance*'s case, the bridge, which was part of the project was completed in 1999 and it was opened for use by the public. There was evidence in that case to show that before the construction of the bridge, there was an existing bridge over Sungai Lingkungan about two kilometres from where the bridge was constructed. During construction of the bridge, the existing bridge was used by vehicles to cross over the river. Even though the whole project had yet to be completed, when the bridge was completed, it was opened for use by the public. This appears to be in line with the provision under cl. 36(a) of the contract relating to the project between the government and the respondent. The purpose of opening the bridge for use by the public was to ensure that there was no interruption on the traffic flow across the river.

[44] In *Malaysia British Assurance*'s case, on or about 23 November 2000, the bridge was damaged by a flood and/or storm. The insured carried out repair works for the bridge. On 14 April 2001 the insured submitted its claim to the appellant demanding payment for the cost of repair of the bridge. The insurer denied liability. The insured sued the insurer under the policy and claimed RM765,812.20. The insurer's defence, relying on the provision on the cover period under the policy, was that since the bridge was already "put into service", its liability under the policy expired.

[45] Similarly as in *Malaysia British Assurance*'s case, the construction works and the highway (which is the subject of the upgrading and repair) were damaged by a massive flood between 19-21 December 2006. Likewise as in *Malaysia British Assurance*'s case, the defendant has denied liability on the basis that the highway was already "put into service". The comparative analysis stated above shows that the facts in *Malaysia British Assurance*'s case are not only similar but almost identical to the present case.

[46] In *Malaysia British Assurance*'s case, the parties submitted on the interpretation of the clause in the contract on the argument of liability. The insurer in that case argued that the clause ought to be interpreted in its plain, natural and ordinary meaning whereas the insured argued that a purposive interpretation applying the *contra proferentum* rule ought to be used instead.

[47] In *Malaysia British Assurance*'s case, the learned judge in the High Court in allowing the insured's claim held as follows:

> In so far as the facts are concerned, there is no dispute that the bridge was completed in 1999 and opened for use by the public and that the bridge was a part of the contract entered into between the government and the Plaintiff. Therefore, giving the plain, natural and ordinary meaning of the words of that clause, it would mean that when the bridge was completed and being used by the public, it was a part of the insured contract works that were "put into service" for which the Defendant would not be liable. But the Plaintiff had argued that the purposive approach to interpretation should prevail or else the cover for the 12 months maintenance period would be rendered illusory because the maintenance period can only come into play after the bridge was completed and also after it was put into use because it cannot be imagined that a bridge should be left idle for 12 months after completion so as to enjoy the period of the insurance. At the very least there appears to be a contradiction in terms when on the one hand you have a provision that puts an end to cover if the bridge was put into use while on the other there is a provision to still provide for cover for 12 months after the bridge was completed and put into use ... it must have been envisaged by the parties giving the circumstances

leading to the purchase of the insurance which was that the Defendant was made aware of the contract which required the Plaintiff to take out a policy with the necessary cover, including coverage for works completed and taken over by the government.

I am thus in agreement with counsel for the Plaintiff that going by the *contra preferentum* rule, the construction favourable to the Plaintiff must be adopted and therefore the damage by the flood was covered by the policy though by then it was already put into use since there was also a provision covering the maintenance period which presupposes the bridge being put into use after its completion. It is surprising that the Defendant persisted in resisting the claim because if they had succeeded it would mean that the government should never accept any policy issued by the Defendant in respect of government contracts that involve infrastructure that are going to be used by the public if the government is not to be under-protected.

[48] The Court of Appeal affirmed the High Court's reasoning and per Raus Sharif JCA (as he then was) delivering the judgment (unreported) said at p. 8:

Such an interpretation would render the 12 month maintenance period illusory because the maintenance period could only come into play after the bridge was completed and after it was put into use. The Learned Judge concluded that the clause on the cover period which put an end to the insurance cover if the bridge was put into use was contradictory to the maintenance provision which still provided for cover for 12 months after the bridge was completed and put into use, and the Learned Judge said he had added "put into use" because Clause 36(a) of the works contract, of which the appellant was well aware, required the taking of a policy with the necessary cover, including coverage for works completed and taken over by the Government. It appears to us that this contradiction created an ambiguous situation raising the necessary question whether the parties had actually intended the cover to end when there was a sectional completion of the project (and this occurred when the bridge was completed) or when there was partial occupation (and this occurred when the bridge was opened for use by the public), even though the object of taking the insurance was to obtain the necessary cover, for the executed works, material and goods until the completion of the whole project, irrespective of any sectional completion or partial occupation by the Government? ... In the face of such an ambiguity, the Learned Judge adopted the construction favourable to the respondent and held that the damage by flood was covered by the insurance policy. We agree with him. In our view to construe the policy in the manner contended by the appellant would be to negate the very purpose of taking out the policy and would lead to absurdity.

Interpretation Of The Policy Cover - The *Contra Proferentum* Rule

[49] The court notes that the "purposive" approach (*contra proferentum* rule) to interpretation of contracts referred to in *Malaysia British Assurance*'s case is embodied in the House of Lords decision of *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 All ER 98 HL. In that case, Lord Hoffman spelt out certain principles relating to interpretation of documents as follows:

1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

2. The background ... includes absolutely anything which would have affected the way in which the document would have been understood by a reasonable man.

3. The meaning which a document ... would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars, the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even ... to conclude that the parties must for whatever reason have used the wrong words or syntax.

4. The rule that words should be given their natural and ordinary meaning reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute an intention to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v. Salen Rederierna AB, The Antaios* [1984] 3 All ER 229:

> If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

[50] Insofar as the *contra proferentum* rule is concerned, this is an established rule on the construction of contracts. The principle was summed up by Lord Brightman in the Privy Council decision of *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd* [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 as follows:

> There is a principle of construction that if a document *inter partes* contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

[51] The Federal Court in the case of *Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud* [1978] 1 LNS 117 FC, applied the *contra proferentum* rule in favour of the assured and held:

> It also seems to me that as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say if there is a doubt as to its extent and question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him.

[52] Applying the principle in *Malaysia British Assurance*'s case in particular the *contra proferentum* rule to the present case, I am thus in agreement with learned counsel for the plaintiff that the damage by the flood was covered by the policy though by then it was already put into use since there was also a provision covering maintenance period which presupposes the roads being put into use after its completion.

[53] As in *Malaysia British Assurance*'s case, the policy in this case contains an extended maintenance clause (exh. P2A p. 89 bundle B). Similarly as in *Malaysia British Assurance*'s case, if the plain and ordinary interpretation was given to the exclusionary clause, such an interpretation would render the extended maintenance period illusory because the maintenance period could only come into play after the construction works were completed and after it was put into use and as such will be contradictory to the maintenance provision.

[54] The intention that liability was to continue notwithstanding that sections of the road were "put into service" is also seen by the several extensions of the policy granted by the defendant to the plaintiff. If the defendant has taken the stand that the policy is repudiated because the works are put into use, why did the defendant keep extending the coverage of insurance policy for construction period and maintenance periods even after the works have been "put into service".

[55] The court finds that prior to the issuance of the policy, the defendant was given copies of the letters of acceptance, the letter of award and had all the background information relating to the construction works to be undertaken by the plaintiff. Clause 9 of the letter of award (p. 12 bundle B) provides that the plaintiff is to carry out the project in phases so as to avoid traffic congestion and inconvenience to the public. Clause 6(b) of the JKR letter (p. 18 bundle B) states that the policy is to be taken out for the entire period of the contract. Since the highway was always in use since the commencement of the works, it would be absurd and make no rational business sense if the natural and ordinary meaning of the words "put into service" is applied. That would mean that liability would immediately cease as soon as the works began and that is plainly not what the parties intended.

[56] Further, the court notes that the loss adjusters in its preliminary view to the defendant as contained in the report prepared by DW2 (exh. P19) had raised reservations as to whether insurer would be entitled to repudiate liability for the claim on the basis that the works had already been "put into service" prior to the occurrence of the flood in December 2006. This is what DW2 said in his preliminary report (P19):

> we have therefore reflected upon whether insurers would be entitled to repudiate liability for the claim on the basis that the works had already been "put into service" long prior to the occurrence of the flood loss in December 2006. We must advise that we have reservations as to whether a repudiation on this basis could be successfully sustained. The reason that we have reservations over this is because since expiry of the original policy period in June 2005 three (3) extensions of the period of policy cover were agreed to by Insurers in line with extensions of the contract period. We understand that information on the state of completion of the works was obtained by Insurers before granting those extensions. As such, had Insurers wished to limit their liability they had opportunity to do so at the time of each period of extending the policy. The sum insured is not stated on the endorsements extending the period of cover. But presuming that it remained that the full value of the works was the basis of the sum insured, it might be considered that Insurers had at time of each extension accepted that they were still insuring the whole of the works.

[57] With regards to the other issues submitted by the parties, I am of the view that it is not necessary for the court to consider since the second plaintiff's claim has been proven.

A

Conclusion

[58] By reasons of the above, I am of the view that the defendant is liable for the damages and losses suffered by the second plaintiff. It has been agreed by the parties that the issue for determination by this court shall only be on the issue of liability. Thus, the issue of quantum to be assessed by the registrar at a later date. Costs for the second plaintiff.

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